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No. 94-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EXXON CORPORATION, *et al.*,
Petitioners,
v.
EYAK NATIVE VILLAGE, *et al.*,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT MEMORANDUM IN OPPOSITION

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The Conditional Cross-Petition filed by Exxon Corporation and Exxon Shipping Company (collectively "Exxon") asks this Court to consider three additional questions if it grants our Petition in No. 94-650. Two of those questions (Nos. 1 and 3) are *identical* to the questions presented in a previous Petition by Exxon, No. 94-385, which this Court denied on October 11, 1994, and declined to rehear on November 28, 1994. The other question (No. 2) is one that Exxon told the Court below was omitted from its Petition in No. 94-385 because Exxon had "concluded that the argument that the fact-specific ruling by [the Court of Appeals] as to Order 83 should provide an independent basis for the Supreme Court to hear the matter simply 'would not write'" and was "certain to be re-

jected." [1] In short, this Court has already found two of the questions presented by this Cross-Petition not certworthy, and Exxon itself has admitted that the third is not.

Exxon's Cross-Petition therefore rests solely upon the proposition that if certiorari is granted on the questions raised by our Petition in No. 94-650, "substantive and pragmatic considerations make it equally important for this Court . . . to address all of the removal issues" decided below, without regard to Rule 10's criteria (Cross-Pet. 10, 19-20). Exxon does not deny that the questions presented by our Petition (regarding the legal standards for federal question removal and for "entire case" removal under 28 U.S.C. § 1441(c)) are entirely distinct from those presented by this Cross-Petition (regarding application of the time limits of 28 U.S.C. § 1446(b) to the particular circumstances under which certain removal notices were filed). Nor does it deny that the *EXXON VALDEZ* cases involved in our Petition (principally class actions) are separate from those involved in the Cross-Petition (principally "direct actions" by class-action opt-outs and other individual plaintiffs).

Contrary to the basic premise of Exxon's Cross-Petition, this Court does not grant certiorari based on "pragmatic considerations" regarding the management of a particular litigation in the lower courts. The Cross-Petition, like the earlier Exxon Petition denied in No. 94-385, does not meet any of the Rule 10 criteria because it presents, at

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[1] Response of Appellees to Court Order of October 6, 1994, filed in *Eyak Native Village v. Exxon Corp.*, 9th Cir. No. 93-35274, on Oct. 13, 1994, p. 2 n.2. Exxon made this statement in explaining its failure to fulfill completely the terms of a stay which it had obtained from the Court of Appeals under Fed. R. App. P. 41(b) by representing that it would seek certiorari as to all four of the District Court orders reversed by the Court of Appeals' decision below. Exxon's Petition in No. 94-385 sought certiorari as to District Court Orders Nos. 91, 92 and 108 but not as to Order No. 83 (which is the subject of Question No. 2 in the present Cross-Petition).

most, extremely narrow questions as to the application of explicit statutory requirements to unique and complex circumstances that are unlikely to recur.[2] *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

For the foregoing reasons, Exxon's conditional cross-petition for a writ of certiorari should be denied. There is no basis for Exxon's suggestion (Cross-Pet. 21) that it be held pending disposition of No. 94-650, where both the parties and the issues are entirely different; doing so would have the unwarranted and unjust effect of delaying still further the resumption of state court proceedings that the Court of Appeals held were improperly interrupted almost three years ago.

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[2] It is apparent from Exxon's own presentation that the questions posited in the Cross-Petition, all regarding application of the 30-day time limit for removal, focus entirely on the minutiae of this particular litigation. See particularly Cross-Pet. 4-6. As we further showed in our Joint Brief in Opposition in No. 94-385, the points which questions 1 and 3 of the Cross-Petition purport to raise were expressly waived by Exxon's categorical statement in its Court of Appeals brief (at 2) that "the outcome as to Order 83 will govern the outcome as to Orders 91, 92 and 108." Notwithstanding the Cross-Petition's largely verbatim repetition of Exxon's denied Petition in No. 94-385, we shall not burden the Court with a repetition of the additional reasons for denying certiorari given in our Joint Brief in Opposition there. Nor do we repeat here the pertinent points made by the Reply Brief for Petitioners in No. 94-650, which is also being filed today.

Additionally, we doubt that Exxon's purported Cross-Petition qualifies as such under Rule 12.3 in view of the separateness of the orders under review, the cases, and the plaintiffs involved from those involved in our Petition. Unless treated as a proper cross-petition, Exxon's filing is untimely because it came more than 90 days after the Court of Appeals' July 13, 1994 denial of rehearing.

Respectfully submitted,

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